

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of DONNA MAE JOHNSON and  
MICHAEL WAYNE JOHNSON, JR., Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MICHAEL W. JOHNSON, SR.,

Respondent-Appellant,

and

BOBBIE JOE KERN,

Respondent.

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UNPUBLISHED  
September 20, 2005

No. 260539  
Cass Circuit Court  
Family Division  
LC No. 01-000346

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Respondent-appellant appeals as of right the trial court's order terminating his parental rights to the minor children under MCL 712A.19b(3)(g) and (j). We affirm.

First, respondent-appellant contends that the trial court erred in qualifying Nancy Smit as an expert witness under the Indian Child Welfare Act (ICWA), 25 USC 1912. We disagree. The trial court's determination that a witness qualifies as a "qualified expert witness" under the ICWA is reviewed under the clearly erroneous standard. *In re Kreft*, 148 Mich App 682, 689; 384 NW2d 843 (1986), citing *In re Cornet*, 422 Mich 274; 373 NW2d 536 (1985); see also MCR 3.977(J).

25 USC 1912(f) provides that "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." MCR 3.980(D) essentially mirrors the requirements of 25 USC 1912(f) with respect to the termination of parental rights where an Indian child is involved.

Smit was an active lifetime member of the Huron Potawatomi tribe who currently worked for the tribe as the case manager in its social work department and had worked for them at an earlier time. She was knowledgeable in the tribal customs and practices pertaining to family organization and child rearing practices. Her seventeen-year professional career had been focused on Native Americans. She worked with other tribes in Canada, where she and her husband established a school for Indian children. When she moved back to Michigan, she obtained a Masters Degree in Social Work from Western Michigan University so that she could become licensed in Michigan. She counseled with tribal community elders and experts from other tribes. She demonstrated a basic understanding of the standards to be utilized. Although Smit had never testified as an expert under the ICWA before, she was recognized by the tribe as an expert and given the authority to represent the tribe in this matter. Thus, in reliance on the requirements set forth in *Kreft, supra*, we conclude that Smit was a qualified expert witness both as “[a] member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organizations and child rearing practices” and as “[a] professional person having substantial education and experience in the area of his or her specialty.” *Id.* at 689-690, quoting 44 Fed Reg 67593, § D.4(b)(guidelines prepared by the United States Department of Interior, Bureau of Indian Affairs); see also *In re Elliott*, 218 Mich App 196, 206-207; 554 NW2d 32 (1996)(adopting and incorporating the analysis set forth in *Kreft* with regard to determining whether a witness is a “qualified expert witness”). Therefore, we hold that the trial court did not clearly err in qualifying Smit as an expert witness under the ICWA. Additionally, we note that several other highly qualified experts with substantial education and experience in children’s issues testified against respondent-appellant, including Dr. James Henry, director of the Children’s Trauma Assessment Center with a Ph.D. in social work and developmental psychology.

Next, respondent-appellant contends that the trial court erred when it terminated his parental rights because there was not proof beyond a reasonable doubt from a qualified expert witness. We disagree. On appeal from proceedings terminating parental rights, this Court reviews the trial court’s findings under the clearly erroneous standard. MCR 3.977(J); *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Gazella*, 264 Mich App 668, 672; 692 NW2d 708 (2005). As stated above, in order to terminate the rights of a parent of an Indian child, there must be evidence beyond a reasonable doubt, including the testimony of a qualified expert witness, that parental rights should be terminated because continued custody of the child by the parent will likely result in serious emotional or physical damage to the child. 25 USC 1912(f); MCR 3.980(D).

In making this argument, respondent-appellant relies solely on the testimony of Nancy Smit. 25 USC 1912(f) and MCR 3.980(D) both require that the evidence *include* the testimony of an expert witness who qualifies under the ICWA, but they do not require that the standard of “beyond a reasonable doubt” be achieved solely by the testimony of that witness. In addition to Smit’s testimony, the court considered the testimony from four other expert witnesses, the caseworker, and psychological reports. The court recognized that it was required to use the standard set forth in 25 USC 1912(f) and MCR 3.980(D). Upon review of the entire record, we conclude that the trial court did not clearly err in finding that petitioner had proven beyond a reasonable doubt that there would be serious emotional or physical damage to the children if they were returned to respondent-appellant.

Finally, respondent-appellant contends that the trial court did not correctly apply the proper standard of review. We disagree. A reasonable doubt is a fair honest doubt growing out of the evidence or lack of evidence. *People v Hill*, 257 Mich App 126, 151; 667 NW2d 78 (2003)(citation omitted). It is not merely an imaginary doubt or possible doubt, but a doubt based on reason and common sense after careful and considerate examination of the facts and circumstances of the case. *Id.*

A parent's failure to comply with the parent/agency agreement is evidence of a parent's failure to provide proper care and custody for the child, *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003), and can be a valid indication of neglect, *In re Trejo Minors*, 462 Mich 341, 360-361 n 16; 612 NW2d 407 (2000). The terms of respondent-appellant's parent/agency agreement required him to consistently attend counseling. The record showed that respondent-appellant initially attended counseling on a regular basis but discontinued doing so when he thought that it was no longer required by the court. When told it was still a requirement, he began to attend sessions again. His counselor testified that no progress was made on the goals of counseling. Instead, respondent-appellant used the counseling sessions to vent his anger and frustration. The evidence clearly showed that, although respondent-appellant attended counseling, he had not benefited from it, which is not sufficient. *Gazella, supra* at 676 ("[I]t is not enough to merely go through the motions; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody"). In addition, there were concerns about respondent-appellant's refusal to seek employment and his continued reliance on his application for Social Security disability benefits based on his injured ankle. The evidence showed that respondent-appellant had twice been refused benefits, and his lawyer for his disability claims testified that his injury was likely not sufficient to qualify him for benefits. Therefore, the trial court did not err in finding that respondent-appellant had not substantially complied with his parent/agency agreement.

Respondent-appellant's primary argument is that, because he was the primary caretaker for his four younger children and because the FIA did not petition to remove those children from his care, there was nothing on the record to show that he would not be a good parent to the minor children involved in this case. While how a parent treats one child is probative of how that parent might treat another, *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001); *In re Powers*, 208 Mich App 582, 592; 528 NW2d 799 (1995), it is not dispositive or determinative of the outcome of a termination hearing. The mere fact that the FIA had not moved to terminate respondent-appellant's parental rights to his four younger children by his current wife does not produce a reasonable doubt with regard to whether he would cause serious emotional or physical damage to his two older minor children. Further, the court relied on several reports from experts in this matter, which were relevant and probative of respondent-appellant's future ability to parent. *In re Johnson*, 142 Mich App 764, 766; 371 NW2d 446 (1985).

In addition to the testimony of the experts, the caseworker, and other reports entered in this case, the court found quite pertinent a report from the Michigan Indian Child Welfare Agency, which reported on respondent-appellant's "poor judgment and decision making skills" and his lack of emotional stability. The children had returned from a visitation with head lice. During the next visitation, respondent-appellant did not perform the requested treatment, and the children again returned to their foster home with head lice. Respondent-appellant did not obtain the requested written verification from the local health department that no one in their household

had head lice. In addition, it was discovered that respondent-appellant was transporting the children illegally and dangerously in his pick-up truck. The court also referred to evidence that the minor daughter came back from visitation with a cut received from cutting a watermelon with a knife she should not have been using, and the minor son came back burned from putting water on hot coals. The court concluded that this evidence demonstrated that respondent-appellant did not properly supervise the children during visitation.

We find that the trial court did not incorrectly apply the beyond a reasonable doubt standard but rather based its finding on a doubt predicated on reason and common sense after a careful and considerate examination of the facts and circumstances of the case. *Hill, supra* at 151. The evidence showed, beyond a reasonable doubt, that continued custody of the children by respondent-appellant would likely result in serious emotional or physical damage to the children. In addition, the evidence was clear and convincing evidence that respondent-appellant failed to provide proper care or custody for the children and there was no reasonable expectation that he would be able to do so within a reasonable time considering their ages, and that there was a reasonable likelihood, based on his conduct and capacity, that the children would be harmed if returned to respondent-appellant's home. MCL 712A.19b(3)(g) and (j).

Affirmed.

/s/ Michael R. Smolenski  
/s/ William B. Murphy  
/s/ Alton T. Davis